

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 29 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0146-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
EVARISTO COTA-PARRA,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2008030793001DT

Honorable Timothy J. Ryan, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

William G. Montgomery, Maricopa County Attorney  
By Diane Meloche

Phoenix  
Attorneys for Respondent

The Ferragut Law Firm, P.C.  
By Ulises A. Ferragut, Jr.

Phoenix  
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Evaristo Cota-Parra seeks review of the trial court's order summarily dismissing his petition for post-conviction relief and denying his motion for rehearing filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings

unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Cota-Parra pled guilty to armed robbery and was sentenced to an aggravated, twenty-one-year prison term.<sup>1</sup> He filed a notice and petition for post-conviction relief, arguing his plea was involuntary because he had not been advised he was waiving his right to require the state to prove aggravating factors to a jury beyond a reasonable doubt. He additionally asserted his trial counsel had improperly induced him to accept the plea by promising he would receive only a seven-year prison term. The state's response included an affidavit by Cota-Parra's trial counsel averring that he had not promised Cota-Parra a particular sentence. The trial court summarily dismissed his petition "[f]or each and every reason set forth in the State's Response."

¶3 Cota-Parra then filed a motion for rehearing, asserting the trial court had erred by failing to treat as true the assertions in his affidavit that counsel had promised he would receive a certain prison term and in rejecting his claim that he had not waived his right to have aggravating factors proven beyond a reasonable doubt in a jury trial. After oral argument, the court denied the motion for rehearing, concluding that an evidentiary hearing was not warranted, despite the existence of conflicting affidavits, and that Cota-Parra had been warned adequately that he was waiving his right to a jury trial on aggravating factors, that the plea agreement and colloquy had appraised Cota-Parra

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<sup>1</sup>Cota-Parra also pled guilty to criminal trespass under a different cause number, for which the trial court sentenced him to a one-year prison term. The trial court ordered that his prison term for armed robbery be served consecutively to that term.

sufficiently of the state's burden of proof, and that a "separate reference to the State's . . . burden of proof" on aggravating factors was not required.

¶4 On review, Cota-Parra repeats the claims made below in his petition for post-conviction relief and motion for rehearing, again arguing the trial court was required to treat the assertions in his affidavit as true and his plea was involuntary because he had not validly waived constitutional rights related to sentencing. We agree with Cota-Parra that the trial court erred by apparently finding the affidavit by Cota-Parra's trial counsel to be more credible than Cota-Parra's own affidavit.

¶5 Rule 32.6(c), Ariz. R. Crim. P., provides for the summary disposition of claims for post-conviction relief if the claim does not "present[] a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings." And Rule 32.6(a) requires that the state's response to any petition for post-conviction relief include any "[a]ffidavits, records or other evidence available to the state contradicting the allegations of the petition." In summarily dismissing Cota-Parra's petition and denying his motion for rehearing, the trial court apparently accepted the state's argument that this provision permits the court to make credibility determinations based solely on affidavits to ascertain whether a defendant is entitled to an evidentiary hearing pursuant to Rule 32.8. *See also* Ariz. R. Crim. P. 32.6(c).

¶6 "A defendant is . . . entitled to a hearing when he presents the trial court with a colorable claim, that is a claim which if his allegations are true might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057

(1986). Given this standard, a trial court plainly is required to take a defendant's assertions as true when evaluating whether he is entitled to an evidentiary hearing. Even if we agreed with the trial court and the state that Rule 32.6(a) reasonably could be interpreted to permit a trial court to resolve conflicted facts in favor of the state in summarily denying relief, our supreme court has rejected that approach unambiguously and "we have no authority to overrule or disregard the decisions of our supreme court." *State v. Garcia*, 220 Ariz. 49, ¶ 8, 202 P.3d 514, 516 (App. 2008).

¶7 Thus, because Cota-Parra's affidavit must be treated as true in determining whether he is entitled to an evidentiary hearing, the trial court erred in summarily dismissing his claim that counsel had improperly induced him to enter the plea by promising a particular sentence. "Arizona courts recognize that a defendant may seek relief from a conviction on the basis that counsel's ineffective assistance induced a guilty plea." *State v. Donald*, 198 Ariz. 406, ¶ 10, 10 P.3d 1193, 1198 (App. 2000); *see also State v. Anderson*, 147 Ariz. 346, 351-52, 710 P.2d 456, 461-62 (1985). Cota-Parra claimed in his affidavit that counsel had informed him on several occasions before entering the plea that he would receive no more than a seven-year prison term. He also asserted that he believed what counsel had told him and "therefore . . . entered a plea of guilty."

¶8 Our supreme court has stated that a "good faith representation of counsel that the defendant will receive a lighter sentence than he actually received will not strip a plea of its 'voluntary nature.'" *State v. Williams*, 107 Ariz. 421, 425, 489 P.2d 231, 235 (1971), *quoting Floyd v. United States*, 260 F.2d 910, 912 (5th Cir. 1958). But here, the

state alleged several aggravating factors before Cota-Parra entered his plea. And, according to Cota-Parra's affidavit, his counsel retreated from the promise of a seven-year prison term after Cota-Parra entered the plea and instead promised a term of 10.5 years' imprisonment. Given the state's allegation of aggravating factors and counsel's allegedly varying promises regarding his sentence, if counsel in fact promised Cota-Parra a seven-year term—the minimum term available—Cota-Parra has made a colorable claim that counsel's alleged promise was not made in good faith and that, because he relied on that promise, his decision to enter the plea was involuntary. *See Schrock*, 149 Ariz. at 441, 719 P.2d at 1057; *Donald*, 198 Ariz. 406, ¶ 10, 10 P.3d at 1198.

¶9 As noted above, Cota-Parra additionally claims he did not waive his right to a jury trial wherein the state would be required to prove aggravating factors beyond a reasonable doubt. We agree with the trial court that the plea agreement plainly provides that Cota-Parra waived his right to a jury trial on aggravating factors; the plea agreement states that Cota-Parra “understand[s] that by pleading GUILTY I will be waiving . . . my right . . . to a trial by jury to determine guilt and to determine any fact used to impose a sentence within the range stated” in the plea agreement, which encompassed the aggravated prison term.

¶10 But a defendant cannot voluntarily, knowingly, and intelligently waive the right to a jury trial on aggravating factors unless he is aware of that right. *State v. Ward*, 211 Ariz. 158, ¶ 13, 118 P.3d 1122, 1126-27 (App. 2005); *see also State v. Brown*, 209 Ariz. 200, ¶ 12, 99 P.3d 15, 18 (2004) (“[T]he Sixth Amendment guarantee of jury trial extends to the finding of [certain aggravating factors] and requires proof beyond a

reasonable doubt.”). Although the plea agreement states that Cota-Parra had agreed the trial court would determine “by preponderance of the evidence” facts “as to any aspect or enhancement of sentence,” it does not state expressly that Cota-Parra waived the right to have aggravating factors proven beyond a reasonable doubt. Nor was Cota-Parra specifically apprised of that right during the plea colloquy. But, even assuming, without deciding, that Cota-Parra did not waive that right, we conclude Cota-Parra has not stated a colorable claim. As we noted above, a claim is colorable only if, taking the defendant’s allegations as true, the outcome would have been different. *Schrock*, 149 Ariz. at 441, 719 P.2d at 1057.

¶11 The state correctly observes that Cota-Parra does not assert in his affidavit that he would have declined to plead guilty had he understood he was waiving his right to have aggravating factors determined beyond a reasonable doubt. “[A] defendant should not be allowed to vacate a plea bargain unless the information he lacked was actually relevant” to his decision whether to enter the plea. *State v. Crowder*, 155 Ariz. 477, 481, 747 P.2d 1176, 1180 (1987). Accordingly, absent any allegation that term was material to his decision to plead guilty, Cota-Parra is not entitled to withdraw from the plea agreement. Instead, at most, he is entitled to have the trial court determine any aggravating factors beyond a reasonable doubt. *Cf. State v. Brown*, 210 Ariz. 534, ¶¶ 13, 31, 115 P.3d 128, 133, 139 (App. 2005) (when plea agreement did not state defendant waived right to jury trial on sentencing factors, defendant entitled to trial before sentencing).

¶12 But the trial court—the same court that sentenced Cota-Parra—concluded the aggravating factors it previously had found were “readily apparent and not subject to any real contradiction,” a conclusion Cota-Parra does not meaningfully dispute.<sup>2</sup> Based on that conclusion, it is plain the court would have found the same aggravating factors and imposed the same sentence had it applied a more stringent burden of proof. Accordingly, because Cota-Parra has not demonstrated there is a reasonable probability the result would have been different, his claim is not colorable and the court did not err in summarily rejecting it. *See Schrock*, 149 Ariz. at 441, 719 P.2d at 1057.

¶13 For the reasons stated, we grant review and grant relief in part. We remand this case to the trial court for an evidentiary hearing regarding Cota-Parra’s claim that counsel had improperly induced him to plead guilty. We otherwise deny relief.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge

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<sup>2</sup>Cota-Parra asserts without citation to the record that the aggravating factors were “untrue.”